

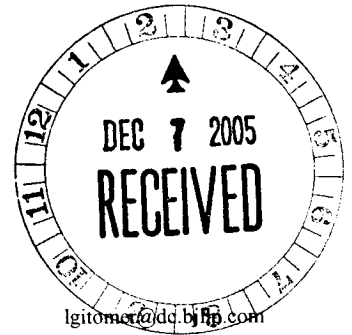
**BALL JANIK LLP**

A T T O R N E Y S

1455 F STREET, NW, SUITE 225  
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307  
FACSIMILE 202-783-6947



215301

LOUIS E. GITOMER  
OF COUNSEL  
(202) 466-6532

December 7, 2005

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
Washington, DC 20423

**RE:** Finance Docket No. 34800, *Indiana & Ohio Railway Company--Trackage Rights--Fulton Railroad Co., Ltd.*

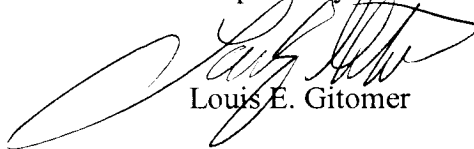
Dear Secretary Williams:

Enclosed for filing are the original and ten copies of a Verified Notice of Exemption under 49 C.F.R. § 1180.2(d)(7), a check covering the \$1,000.00 filing fee, 20 additional maps, along with file Notice of Exemption.doc on one 3.5-inch IBM-compatible floppy diskettes.

Please time and date stamp the extra copy of this letter and the Notice of Exemption and return it with our messenger.

If you have any questions, please call or email me.

Respectfully submitted,



Louis E. Gitomer

Enclosures

**FILED**

DEC 7 2005

**SURFACE  
TRANSPORTATION BOARD**

**ENTERED**  
Office of Proceedings

DEC 7 2005

Part of  
Public Record

**ORIGINAL**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 34800

---

INDIANA & OHIO RAILWAY COMPANY  
—TRACKAGE RIGHTS—  
FULTON RAILROAD CO., LTD.

---

VERIFIED NOTICE OF EXEMPTION

---



Gary A. Laakso, Esq.  
Vice President – Regulatory Counsel  
INDIANA & OHIO RAILWAY COMPANY  
5300 Broken Sound Boulevard, N.W.  
Second Floor  
Boca Raton, FL 33487  
(561) 994-6015

Louis E. Gitomer, Esq.  
Of Counsel  
Ball Janik LLP  
1455 F Street, N.W., Suite 225  
Washington, DC 20005  
(202) 638-3307

Attorneys for:  
INDIANA & OHIO RAILWAY COMPANY

Dated: December 7, 2005

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 34800

---

INDIANA & OHIO RAILWAY COMPANY  
—TRACKAGE RIGHTS—  
FULTON RAILROAD CO., LTD.

---

VERIFIED NOTICE OF EXEMPTION

---

The Indiana & Ohio Railway Company ("IORY") submits this Verified Notice of Exemption pursuant to the class exemption at 49 C.F.R. § 1180.2(d)(7) for local and overhead trackage rights over the rail line owned by the Fulton Railroad Co., Ltd. ("Fulton"). The parties have entered into a written agreement for the trackage rights (Exhibit B) which are not sought as a responsive application in a rail consolidation proceeding.

Pursuant to the Surface Transportation Board's (the "Board") regulations at 49 C.F.R. § 1180.4(g), IORY submits the following information:

**Section 1180.6 Supporting Information**

**(a)(1)(i) Description of Proposed Transaction**

IORY is acquiring local and overhead trackage rights from Fulton over its line from milepost 0.0 and continuing for 4,800 feet to the end of the track, in the City of Cincinnati, Millcreek Township, Hamilton County, Ohio, a total distance of approximately 4,800 feet.

Name and address of tenant railroad:

Indiana & Ohio Railway Company  
497 Circle Freeway Drive, Suite 230  
Cincinnati, OH 45246

Questions and correspondence concerning this notice may be addressed to:

Gary A. Laakso, Esq.  
Vice President – Regulatory Counsel  
INDIANA & OHIO RAILWAY COMPANY  
c/o RailAmerica, Inc.  
5300 Broken Sound Boulevard, N.W.  
Second Floor  
Boca Raton, FL 33487  
(561) 994-6015

**(a)(1)(ii) Consummation Date**

The transaction is scheduled to be consummated on or shortly after December 14, 2005.

**(a)(1)(iii) Purpose Sought to be Accomplished**

The involved trackage rights will enable IORY to enhance service.

**(a)(5) List of States in which the Party's Property is Situated**

IORY operates in the States of Indiana, Ohio and Michigan. Fulton owns and operates 4,800 feet of track in Cincinnati, Ohio.<sup>1</sup> The involved trackage rights are located in the State of Ohio.

**(a)(6) Map**

A map illustrating the involved trackage rights is attached as Exhibit A.

**(a)(7)(ii) Agreement**

A copy of the executed trackage rights agreement is attached as Exhibit B.

**Labor Protection**

This trackage rights transaction involves two Class III railroads. Therefore, under 49 U.S.C. § 11326(c) since only Class III rail carriers are involved, no labor protection applies to the proposed transaction.

---

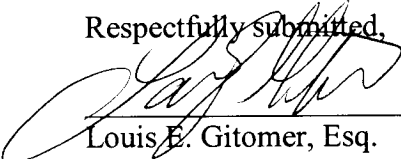
<sup>1</sup> *The Fulton Railroad Co., Ltd.—Acquisition and Operation Exemption—Cincinnati Railway Company*, STB Finance Docket No. 34135 (STB served December 27, 2001).

**Environmental and Historic Matters**

Environmental and historic impacts associated with trackage rights transactions generally are considered to be insignificant. Therefore, environmental and historical reports and documentation normally need not be submitted for this type of transaction, pursuant to 49 C.F.R. § 1105.6(c)(4) and § 1105.8(b)(3).

Gary A. Laakso, Esq.  
Vice President Regulatory Counsel  
INDIANA & OHIO RAILWAY  
COMPANY  
5300 Broken Sound Boulevard, N.W.  
Boca Raton, FL 33487  
(561) 994-6015

Respectfully submitted,



Louis E. Gitomer, Esq.  
Of Counsel  
Ball Janik LLP  
1455 F Street, N.W.  
Second Floor, Suite 225  
Washington, DC 20005  
(202) 638-3307

Attorneys for:  
INDIANA & OHIO RAILWAY COMPANY

Dated: December 7, 2005

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

FINANCE DOCKET NO. 34800

INDIANA & OHIO RAILWAY COMPANY  
—TRACKAGE RIGHTS—  
FULTON RAILROAD CO., LTD.

Fulton Railroad Co., Ltd., has agreed to grant local and overhead trackage rights to Indiana & Ohio Railway Company from milepost 0.0 to the end of the track in Cincinnati, Ohio, a total distance of approximately 4,800 feet. The trackage rights will be effective on December 14, 2005.

This Notice is filed under § 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

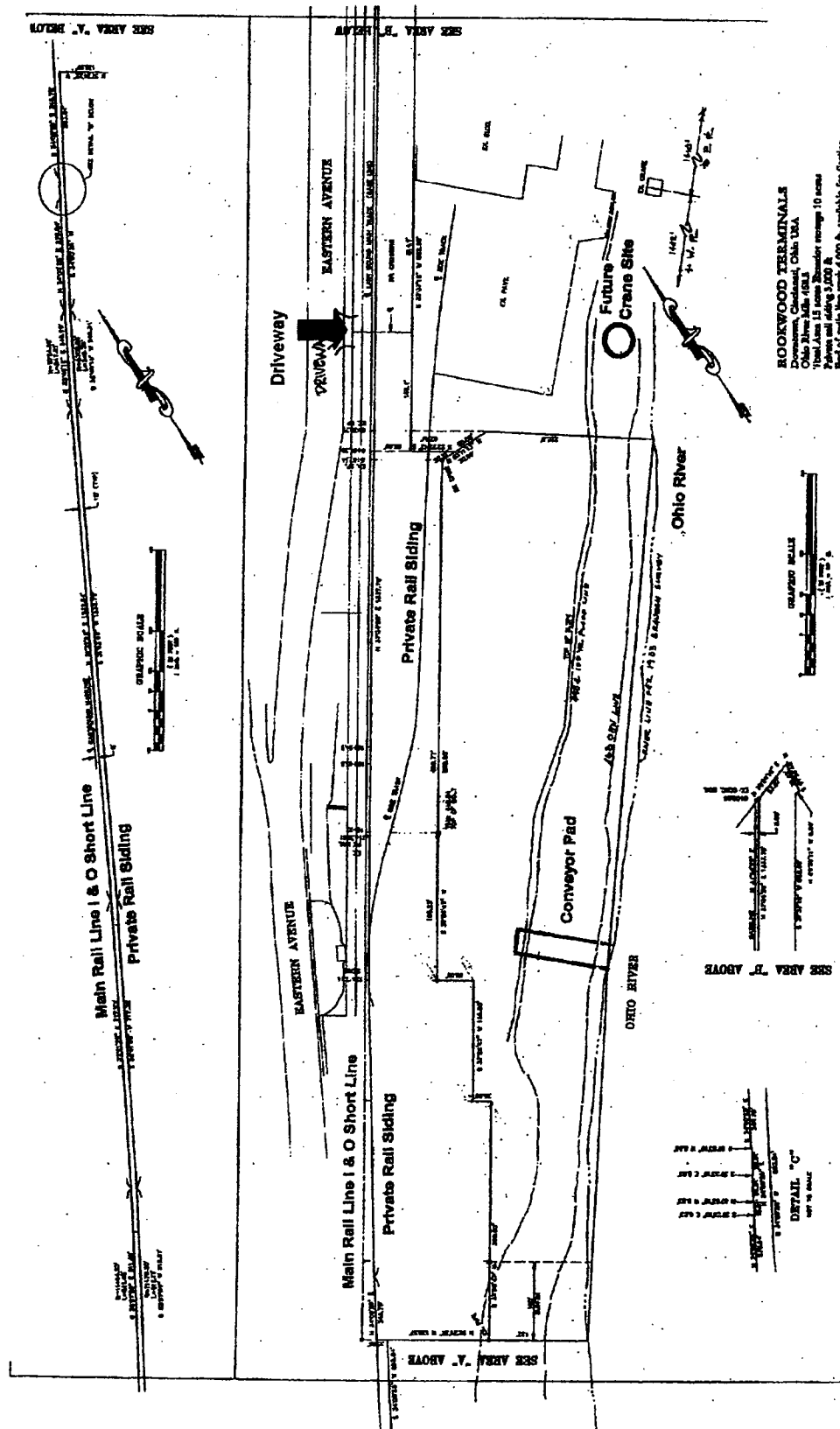
Dated:

By the Board.

Vernon A. Williams  
Secretary

# **EXHIBIT A-MAP**

# ROOKWOOD TERMINALS SITE PLAN





# **EXHIBIT B-AGREEMENT**

## **OPERATING RIGHTS AGREEMENT**

This Agreement is entered into as of the 6<sup>th</sup> day of January, 2002 ("Agreement Date") by and between), FULTON RAILROAD Co. Ltd., an Ohio corporation with principal offices and place of business in Hamilton County, Ohio; and INDIANA & OHIO RAILWAY COMPANY INC. ("IORY"), a Delaware corporation with principal offices and place of business in Butler County, Ohio.

### **ARTICLE I. RECITALS**

Section 1.1. IORY is a railroad providing common carrier and contract rail freight haulage services. IORY owns and operates a track (the "IORY Track") which connects with Fulton Railroad near Milepost 1.1 on the IORY Oasis Line in Cincinnati, Ohio.

Section 1.2. Fulton Railroad owns track and property adjacent to that of the IORY. Customers of the IORY and Fulton Railroad utilize IORY Main Track to load and unload rail cars. In the event this access is prevented due to establishment of passenger service in this corridor, Fulton Railroad desires to grant IORY operating rights over the Fulton Railroad Track in order that IORY may provide rail transportation services to customers of the IORY and Fulton Railroad.

NOW THEREFORE, in consideration of the parties' mutual undertakings, the parties agree as follows:

### **ARTICLE II. TERM**

Section 2.1. The term of this Agreement shall commence on the Agreement Date and shall continue to and including January 5, 2012, unless earlier terminated as provided below in this Article II.

Section 2.2. Fulton Railroad may terminate this Agreement as to the Fulton Railroad Track, by giving ninety (90) days written notice to IORY and IORY may terminate this Agreement as to the remaining Track by providing the same notice.

### **ARTICLE III. CONSIDERATION FOR GRANTS OF OPERATING RIGHTS**

Section 3.1. The parties' reciprocal grants, waivers and consents constitute consideration for their respective undertakings in this Agreement. In addition, the payments reserved to Fulton Railroad in Section 3.2 below constitute additional consideration for Fulton Railroads undertakings herein.

Section 3.2. Fulton Railroad shall be entitled to and IORY shall pay Fulton Railroad, a sum equal to \$25.00 per loaded car across the Fulton Railroad Track. IORY shall pay the Fulton Railroad quarterly on or before the 15<sup>th</sup> day of the following month, without demand. Each Fulton Railroad Payment shall be accompanied by a written statement of the number of loaded cars moved over the Fulton Railroad Track by IORY in the month for which the Fulton Railroad Payment is made. When payments exceeds \$20,000 per month, payments will be made monthly rather than quarterly.

### **ARTICLE IV. PROVISIONS APPLICABLE TO EXERCISE OF OPERATING RIGHTS**

#### **Section 4.1.**

Fulton Railroad will appoint IORY as dispatcher for Fulton Railroad Track. This dispatcher is referred to hereinafter as the "Dispatcher" with respect to that portion of the Fulton Railroad Track for which such dispatcher is responsible. IORY agrees to serve as dispatcher for the Fulton Railroad Track, without additional compensation.

Section 4.2. Responsibility for maintenance and repair of the Fulton Railroad Track during the term of this Agreement shall be allocated among the parties as follows:

- (a) IORY, at its own expense, shall be responsible for routine maintenance of the track know as the "Noramco Lead" Track.
- (b) Fulton Railroad, at its own expense, shall be responsible for routine maintenance of all other tracks not specified in (a) above. IORY's trains utilizing the Fulton Railroad Track may contain locomotives and cars weighing up to a maximum of 420,000 pounds for locomotives and 286,000 pounds for cars.

Section 4.3.

(a) IORY shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and equipment while such trains, locomotives, cars, and equipment are being operated over the Fulton Railroad Track. IORY shall indemnify, protect, defend, and save harmless Fulton Railroad from and against all fines, penalties and liabilities imposed upon any party or its parent corporation, subsidiaries or affiliates, or their respective directors, officers, agents and employees under such laws, rules, and regulations by any public authority or court having jurisdiction in the premises, to the extent attributable to any failure of IORY to comply with its obligations in this regard.

(b) IORY shall ensure that all of its employees who shall operate its trains, locomotives, cars and equipment over the Fulton Railroad Track have received all necessary training. Fulton Railroad shall not be required to bear any expense in connection with training of IORY's employees.

(c) Fulton Railroad may exclude from their Track any IORY employee found to have violated their respective safety rules or any applicable federal, state or local statute, regulation or ordinance.

Section 4.4. Nothing in this Agreement shall be construed to render Fulton Railroad liable for any mileage or car hire charges accruing on cars in any other party's trains on the Fulton Railroad Track. IORY shall indemnify and hold Fulton Railroad harmless from any liability or claim for such charges.

Section 4.5. Each party to this Agreement shall be entitled during normal business hours and upon reasonable notice to the other party to inspect and copy the records of any other party documenting its usage of the Fulton Railroad Track and the amount of any expenses for which reimbursement is claimed under this Agreement.

Section 4.6. The responsibility and liability between the parties for: (i) any personal injury or death of any person (including employees of the parties and third person), (ii) any real or personal property damage of any person (including the Fulton Railroad Track and other property of the parties and third persons), (iii) any damage or destruction to the environment (including land, air, water, wildlife and vegetation), and (iv) all cleanup and remedial expenses, court costs, litigation expenses and attorney's fees (all of which are collectively referred to as a "Loss") resulting from the use of the Fulton Railroad Track by other party as described herein, will be divided as follows:

(a) Each party is solely responsible for any Loss caused solely by that party's negligence or other fault. Each party shall assume and bear all responsibility for damage caused by acts or omissions of any its employees while under the influence of drugs or alcohol.

(b) If a Loss occurs on the Track involving only the trains, locomotives, cars or equipment of any one party then that party is solely responsible for the Loss, unless the Loss is caused solely by the negligence or other fault of another party to this Agreement.

(c) If a Loss occurs on the Fulton Railroad Track involving the trains, locomotives, cars or equipment of more than one party, then: (i) each party is solely responsible for any Loss to its own employees, locomotives and equipment in its own train including lading and (ii) the parties are responsible for any Loss to the Fulton Railroad Track and any Loss sustained by third parties, according to the proportionate responsibility between them as to the cause of the Loss.

(d) For purposes of assigning responsibility for a Loss under this section as between the parties hereto, a Loss involving the equipment of one of the parties to this Agreement and the equipment of a third party or parties shall be construed as being a Loss involving only the equipment of the party to this Agreement and responsibility for the Loss shall be determined as provided above in this section.

(e) Whenever any liability, cost, or expense is assumed by or apportioned to a party hereto under the foregoing provisions, that party shall forever protect, defend, indemnify, and save harmless the other party to this Agreement and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents, and employees from and against that liability, cost and expense assumed by that party or apportioned to it, regardless of whether caused in whole or in part by the fault, failure, negligence, misconduct, nonfeasance, or misfeasance of the indemnitee or its directors, officers agents, or employees.

(f) In every case of death or injury suffered by an employee of any party, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employers' liability or other law, and any other parties, under the provisions of this Agreement, is required to pay said compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying any such future installments by reason of the expiration or other termination of this Agreement prior to any or the respective dates upon which any such future installments are to be paid.

(g) If any suit or action shall be brought against any party for damages which under the provisions of this Agreement are in whole or in part the responsibility of any other party, the other party shall be notified in writing by the party sued, and the party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay a proportionate part of the judgment and costs, expense and attorneys' fees incurred in such suit according to its liability assumed hereunder.

Section 4.7.

(a) Except as provided in Subsection (b) below, all claims by third parties for injuries, death, property damages and losses arising out of or connected with this Agreement shall be investigated, adjusted and defended by the party bearing the liability, cost, and expense therefore under the provisions of this Agreement.

(b) In the event a claim or suit is asserted against any party which any other party has the duty under this Agreement to investigate, adjust or defend, then, unless otherwise agreed, the other party shall, upon request, assume responsibility for and conduct the investigation, adjustment and defense of such claim or suit.

(c) All costs and expenses in connection with the investigation, adjustment and defense of any claim or suit under this Agreement shall be included as costs and expenses in applying the liability provisions set forth in this Agreement, except that salaries or wages of full-time employees (including attorneys) of either party engaged directly or indirectly in such work shall be born by such party.

(d) Excluding freight loss and damage claims filed in accordance with 49 U.S.C. Section 11706, neither party shall settle or compromise any claim, demand, suit or cause of action for which the other party has any liability under this Agreement without the concurrence of such other party if the consideration for such settlement or compromise exceeds Five Hundred Dollars (\$500).

(e) Each party agrees to indemnify and hold harmless the other parties and their parent corporations, subsidiaries and affiliates, and all their respective directors, officers, agents and employees from and against any and all costs and payments, including benefits, allowances and arbitration, administrative and litigation expenses, arising out of claims or grievances made by or on behalf of its own employees, pursuant to the applicable collective bargaining agreement. It is the intention of the parties that each party shall bear the full costs of protection of its own employees under employee protective conditions which may be imposed, and of grievances filed by its own employee arising under its collective bargaining agreements with its employees.

(f) It is understood that nothing in this article shall modify, or waive the conditions, obligations, assumptions or apportionments of liability provided in Section 4.6 above.

#### Section 4.8.

(a) During the term of this Agreement IORY agrees to procure and maintain at their respective sole cost and expense comprehensive general liability insurance, or equivalent self insurance, hereinafter called "Insurance", naming Fulton Railroad as insureds and covering the liability assumed by it and its agents under the terms of this Agreement and by virtue of each party's usage of Fulton Railroad Track. Fulton Railroad shall be listed as an additional insured on each such policy. The Insurance shall be in an amount not less than Two Million Dollars (\$2,000,000) combined single limit for personal injury and property damage per occurrence.

(b) The Insurance shall contain provisions obligating the insurer to provide each party with notice of cancellation, material modification or non-renewal at least thirty (30) days prior to the effective date thereof.

(c) The Insurance shall be evidenced by a current certificate of insurance addressed to each party as an additional insured. The initial certificate shall be forwarded to each party



with the return of the executed contract. Subsequent renewal certificates will be sent directly to the address of each party listed in Article VIII below.

Each insurance certificate shall be subject to the prior approval of the party entitled under this section to receive it. All of the required endorsements and notice provisions shall be stated on the certificate of insurance that is provided to each party.

Section 4.9. Fulton Railroad make no warranties to IORY that the Fulton Railroad Track is suitable for service and shall not be liable for losses incurred by IORY arising out of its inability to use the Fulton Railroad Track.

Section 4.10. The parties recognize that passenger train operation could commence on existing track as some point in the future. In this event, Fulton Railroad may place in service a track that currently exists parallel to existing track so that service will remain uninterrupted. The parties recognize that the switch layout may need to change to accommodate new method of operation. Parties other than Indiana & Ohio Railway will be responsible for costs of such upgrades.

#### **ARTICLE V. INDEMNIFICATION**

Section 5.1. This Article V governs indemnification against claims arising under this Agreement or as result of the exercise of rights granted hereunder, other than claims involving death, bodily injury or property damage arising out of the operation of trains and equipment over the Fulton Railroad Track (which are governed by Article IV of this Agreement).

#### **ARTICLE VI. REGULATORY APPROVALS**

Section 6.1. Fulton Railroad shall at its own expense take any action necessary to obtain any required approval from any federal or state agency for IORY's exercise of the respective rights granted to it under this Agreement.

## **ARTICLE VII. MISCELLANEOUS PROVISIONS**

Section 7.1. Any dispute arising between the parties with respect to this Agreement which is not resolved by mutual agreement shall be jointly submitted for binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator shall be final and conclusive upon the parties hereto. Each party to the arbitration shall pay the compensations, costs, fees and expenses of its own witnesses, experts and counsel. The compensation, costs and expense of the arbitrator, if any, shall be born equally by the parties to the arbitration. The arbitrator shall not have the power to award consequential or punitive damages or to determine violations of criminal or antitrust laws. Except as required in the Prior Agreements, or any of them, no party shall be required to arbitrate any dispute concerning the validity, construction or application of the Prior Agreements or any of them or concerning ownership of any portion of Fulton Railroad Track under the terms of this Agreement.

Section 7.2. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Neither party hereto shall transfer or assign this Agreement, or any of its rights, interests or obligations hereunder, to any person, firm, or corporation without obtaining the prior written consent of the other party to this Agreement.

Section 7.3. Any notice required or permitted to be given by one party to the other under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the parties may agree, and shall be addressed as follows:

If to Fulton Railroad: Fulton Railroad  
3033 Eastern Avenue  
Cincinnati, Ohio 45226-1051

If to IORY: Indiana & Ohio Railway, Inc.  
497 Circle Freeway Drive, Suite 230  
Cincinnati, Ohio 45246  
Attention: Regional Vice President

Either party may provide changes in the above addresses to the other party by personal service or U.S. certified mail.

Section 7.4.

(a) This Agreement and each and every provision hereof are for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against either of the parties hereto.

(b) This Agreement contains the entire understanding of the parties hereto and supersedes any and all oral understandings between the parties relating to the subject matter hereof.

(c) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all parties to this Agreement.

(d) All Article headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

(e) This Agreement is the result of mutual negotiations of the parties hereto, none of whom shall be considered the drafter for purposes of contract construction.

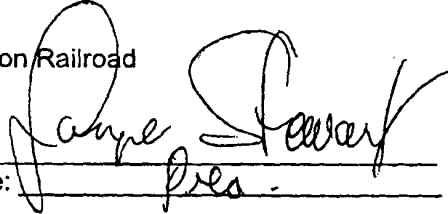
(f) No party hereto may disclose the provisions of this Agreement to a third party, excluding a parent, subsidiary or affiliate company, without the written consent of the other parties, except as otherwise required by law, regulation or ruling.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly  
executed as of the date first above written.

Fulton Railroad

By:

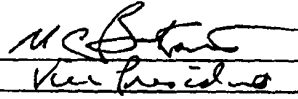
Title:

  
Pres.

Indiana & Ohio Railway, Inc.

By:

Title:

  
Vice President

**VERIFICATION**

State of Florida                    )  
  )ss  
County of Palm Beach         )

I, Larry Bush, being duly sworn, depose and state that I am Vice President-Treasurer of the Indiana & Ohio Railway Company, that I am authorized to make this verification, and that I have read the foregoing Notice of Exemption, and know the facts asserted therein are true and accurate to the best of my knowledge, information and belief.

*Larry W. Bush*  
Larry Bush

Subscribed and sworn to before me this 15<sup>th</sup> day of December 2005.

*Kristin Dunlap*  
Notary Public

PERSONALLY KNOWN: *[Signature]*  
PRODUCED I.D.:                     

My Commission expires: 12/27/09

